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In The

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-568

DAISY ALOMAR,

Petitioner,

vs.

WILLIAM F. DWYER, JULIAN H. ORR, EUGENE TENNIS, ANNE HASEN, JOSEPH SWEET, MYRON ZEITLER and EMILIO SERRANO,

Respondents.

BRIEF IN OPPOSITION TO THE WRIT OF CERTIORARI BY DAISY ALOMAR

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ARGUMENT IN OPPOSITION TO THE WRIT OF CERTIORARI

POINT I

Petitioner, as a provisional employee, had no Civil Service protection and, therefore, could be terminated at will.

Petitioner has attempted to raise questions as to the status of provisional employees under New York State Civil Service Law. The rule, however, is well established that provisional appointees have no protected civil service status or rights under New York law. *Kosco v. Green,* 260 NY 491, 184 NE 65, 258 NYS 597, (1933); *Fink v.*

Kern, 176 Misc. 114, at 117, affirmed 262 App. Div. 829, 26 N.Y.S. 2d 891, (Sup. Ct. 1941). This general rule was clearly stated in the case of *Fink v. Kern*, supra, where the court held:

> "It may be observed that the Courts look with disfavor upon an interpretation that tends to include temporary or provisional employees in 'covered in' [Civil Service] groups. Provisional appointees acquire no vested right to appointment to the position merely by virtue of such temporary or provisional service."

In *Schmidt v. Flynn*, 200 NYS 2d 1009, (Sup. Ct. 1960), this rule was applied to facts precisely the same as those in the instant case. The petitioner had been a provisionally appointed superintendent of a water district whose position was in the competitive class of civil service. After being discharged, Schmidt requested the court to compel the dismissal of Schmidt's successor and to compel Schmidt's reinstatement. One of the grounds upon which Schmidt sought this relief was that his firing had been due to a change of the political complexion of his board of superiors. The court, in dismissing that argument as untenable, held that Schmidt, as a provisional appointee, was subject to removal for any cause and that "the political one is the traditional exercise of the democratic process which is restricted only by the Civil Service Law and the good judgment of the appointive power." The right of a government to terminate the employment of an otherwise unprotected employee "for political reasons" was also recognized by the Court of Appeals in *Merriweather v. Roberts*, 268 NY 12, N.E. 621 (1935).

Similarly, in *Mercado v. New York City Youth Board*, 21 Misc. 2d, 228, at 229, 196 N.Y.S. 2d 969, (Sup. Ct. 1959), the petitioner had been provisionally appointed to a posi-

tion as a senior street club worker. After approximately one year of service in this capacity, Mercado was summarily discharged without a hearing. Mercado then proceeded under Article 78 of the Civil Practice Law and Rules of New York to obtain reinstatement to his position. The Court held that "since petitioner did not qualify for his position on the basis of merit pursuant to a competitive test, he acquired no legal rights to the position and was subject to removal at will".

Petitioner has cited two cases which she claims provided protection to provisional appointees. *Rindone v. Kern*, 282 NY 214, 26 N.E. 2d 23 (1940), is cited as authority for the proposition that Daisy Alomar should be reinstated and allowed to take a civil service examination for her former position. The *Rindone* case, however, is in no way analogous to the case at bar. In that case, the plaintiffs were provisional employees who were excluded from taking the civil service examination for the competitive positions to which their provisional appointments were made. The Court ruled that this *exclusion* was improper and that the plaintiffs should remain in their positions until such time as they could take the examination and determine their rank on the eligibility list for appointment. The key distinguishing point in *Rindone* is that a competitive examination was held. In the case at bar petitioner has never alleged that she either took a competitive examination by which she would have gained civil service protection, nor that she was improperly excluded from taking one.

Petitioner also cites the recent decision of the *Matter of Tischler v. Board of Education*, 37 A.D. 2d 261 (2nd Dept. 1971) as standing for the proposition that Section 107 of the Civil Service Law of New York prohibits the termination of provisional employees for their political opinions

or affiliations. The *Tischler* decision involved an action by a non-tenured teacher against a school board for summary termination allegedly due to his union activities. Section 107 of the Civil Service Law of New York was never mentioned in the decision. The Court held that Tischler had a cause of action because of the allegation of violation of his First Amendment right to belong to a union and because failure to grant tenure to a teacher solely because of teachers' union activities was a blatant violation of the Taylor Law, (Civil Service Law of New York, Article 14) which specifically protects the right of New York public employees to organize and join unions.

The United States Court of Appeals for the Second Circuit, after reviewing the New York Civil Service Law and the cases thereunder, ruled that Daisy Alomar was not entitled to any civil service protection of her status as a provisional employee and, therefore, her employment was terminable at will without notice or hearing.

Citing *Bailey v. Richardson*, 182 Fed 2d 46 (D. C. Cir. 1950), aff'd per curiam, 341 US 918 (1950) the Court held that the sole protection for public employees who were terminated for political reasons must be found in the civil service statutes. Daisy Alomar had no protection under the New York Civil Service Law, therefore she could be dismissed for political reasons without notice or a hearing. It has often been held by the Supreme Court, that there is no constitutionally protected right to government employment, and that in the case of an unprotected employee, notice of discharge and a hearing thereon are not required where the only thing at stake is a specific government job.

POINT II

The Decisions of the various Circuits of the United States Court of Appeals are not split on the issue involved in the petition of Daisy Alomar.

Petitioner attempts to have the petition for certiorari granted by asserting that there is a serious split among the Circuits of the Court of Appeals which is relevant to the case at hand. However, none of the cases cited by the petitioner involve the firing of a non-protected public employee because of political enrollment. The cases cited as evidencing the division among the Circuits, *Drown v. Portsmouth School District*, 435 Fed 2d 1182 (1st Cir. 1970), *Sindermann v. Perry*, 430 Fed. 2d 939 (5th Cir. 1970), *Roth v. Board of Regents*, 310 Fed. Supp. 972 (D. Wisc. 1970), *Parker v. Board of Education*, 348 Fed. 2d 464 (4th Cir. 1965), *Freeman v. Gould Special School District*, 405 Fed 2d 1153 (8th Cir. 1969) all involve various activities of school teachers. Furthermore, these cases deal with alleged racial discrimination, retaliation for the exercise of free speech, or retaliation for taking an active role in union activities. That employment issues in the academic world require special consideration was made amply clear in *Johnson v. Branch*, 364 Fed. 2d 177 (4th Cir. 1966), which stated as follows:

> "The Supreme Court has recently had occasion to consider the law in this and analagous areas. It has pointed out on numerous occasions the importance of the teaching profession in our democratic society and the necessity of protecting its personal, associational and academic liberty."

In contrast to the above stated treatment of teachers, the Supreme Court has recognized that no such protection exists for public employees of the executive branch of a

government. For example, in *Bailey v. Richardson,* 182 Fed. 2d 46 (D.C. Cir. 1950), the Court stated as follows:

> "It is next said that appellant's dismissal impringed upon the rights of free speech and assembly protected by the First Amendment, since the dismissal was premised upon alleged political activity. This suggestion goes not to the procedure, but to the ultimate validity of the dismissal itself. But the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. That document, standing alone, does not prevent Republican Presidents from dismissing Democrats or Democratic Presidents from dismissing Republicans. From the beginning, such has been the practice, with variations in scope. The reason that it has not continued to so great an extent is because the people became convinced that it was not good government and the Congress and the President wrote that view into statutes and regulations. They, not the Constitution, give Government employees such protection as they have against dismissal for political reasons."

The only authority outside of the academic field cited by petitioner which could be relevant to this case is *Birnbaum v. Trussell,* 371 Fed. 2d 672 (2nd Cir. 1966). In that case, Dr. Birnbaum, a non-protected employee, was summarily discharged from municipal employ without notice or hearing due to his alleged racial discrimination. The court, in that action, held that the summary discharge of a non-protected public employee could violate procedural due process if the discharge would damage a "substantial interest" of the employee other than his desire for a specific job. In Dr. Birnbaum's case, it was found that the circumstances of his discharge would seriously damage his professional reputation and eligibility for other employment because he was discharged for alleged racial discrimination. Therefore, notice and a hearing on the charges were required.

In the instant case, petitioner has made no allegation of an interest of the type found in the Birnbaum case and the Second Circuit, which decided both the Birnbaum case and the instant case must have found no such interest.

CONCLUSION

There is no question that Daisy Alomar was a provisional employee without civil service protection. The Supreme Court in *Bailey v. Richardson* clearly ruled that in the case of executive branch employees, the only source of protection is the civil service law. The petition for certiorari has failed to cite any authorities in the Circuits or elsewhere which are in conflict with that decision or to demonstrate that the holding of the court below is in conflict with that decision. The petitioner asks this court to reverse two hundred years of political history, to in effect accord to all governmental employees civil service protection, and to thus thrust the court into a "political thicket". These hazards were rejected by the Court below and should be rejected now. The petition for certiorari must therefore be denied.

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